

March 24, 2011

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Implementation of Section 224 of the Act; WC Docket No. 07-245

Dear Ms. Dortch:

On March 23, 2011, the undersigned spoke with the following Commission officials in a telephone call organized by the Office of General Counsel: Michael Steffen, Diane Holland, Raelynn Remy, and Christi Shewman. This call was in regard to the Commission's statutory authority to adopt a revised telecommunications service rate formula in the above captioned docket. The following summarizes and supplements our discussion.

The statutory analysis provided by Bright House Networks and other commenters emphasized that the FCC's proposal to set the telecom service rate at the higher of the cable service rate or the lower-end telecom service rate – leading to the cable rate as the default rate, generally – is entirely consistent with the text and structure of Section 224.¹ In particular, Section 224(b) requires that all pole attachment rates must be "just and reasonable" and subsection (d)(1) defines "just and reasonable" by establishing a zone within which a Commission rate must fall.

Under the plain terms of the statute, Section 224(e), which details aspects of how the telecom service rate must be derived, must be interpreted consistently with Section 224(b). It does not stand alone. As such, the FCC's proposal to cap the Section 224(e) telecom rate at the upper end of Section 224(d)(1) is in harmony with Congress's directive to the FCC in Section 224. Expressed more emphatically, implementation of a telecom service rate that produces rates exceeding Section 224(d)(1)'s upper bound would be difficult to square with Section 224(d)(1)'s mandate that a "just and reasonable" rate for any attachment is defined, at its apogee, by the (d)(1)'s upper bound. Thus, apart from the compelling broadband policy reasons to adopt a telecom rate more in line with the existing cable rate, the FCC's telecom rate proposal is faithful to the words of the statute.

¹ 47 U.S.C. § 224. See Comments of Bright House Networks at 14-27; Reply Comments of Bright House Networks 5-9; Reply Comments of Time Warner Cable at 9-12.

You asked additionally if Section 224(d)(3) requires a contrary result. That provision states:

This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

The first sentence directs the FCC to set a rate under (d)(1) for a particular type of attachment, i.e., an attachment used “solely to provide cable service”. It does not specify the rate to be adopted, i.e., the upper bound of (d)(1), the lower bound of (d)(1), or some rate in between. It only says that when an attachment is used “solely to provide cable service”, the FCC must apply that adopted rate, and that rate only.

The second sentence directs the FCC to apply that same rate to telecommunications service attachments until the FCC’s telecom service rate becomes effective (which was not for years after Congress amended Section 224 to address telecommunications services). Thereafter, the FCC was to apply the telecom service rate.

The suggestion that (d)(1) only applies to cable service attachments (and telecom service attachments prior to the effective date of the telecomm rate rules) is belied by the mandate of 224(b), which applies to every attachment rate established by the FCC. Any other interpretation reads the first words of Section 224(d)(1) – “For purposes of subsection (b) of this section” – out of the statute. Sections 224(a)(4) and (b) together require “just and reasonable” rates for “any” attachment. Just as Section 224(a)(4) explains that “pole attachment” in Section 224(b) means “any” attachment², Section 224(d)(1) explains what “just and reasonable” in Section 224(b)³ means. It is the third element of Section 224’s triad – (a)(4), (d)(1), and (b) – used to define just and reasonable pole attachment rates required by Section 224(b).

The Supreme Court reached a similar result in *NCTA v. Gulf Power Co.* In that case, the Court found the FCC had unambiguous authority to set rates for any attachment under 224(b), including attachments that commingled video service with undefined services. The Court of Appeals had held that the authority to specify rates for “cable service only” and “telecommunications service” in (d)(3) and (e) exhausted the FCC’s rate-setting authority. The Court determined that Sections 224(d)(3) and 224(e) meant no such thing and that they “work no limitation on §[224](b)”.⁴ It is thus clear, both from the structure of the statute and the Court’s review in *Gulf Power*, that the FCC is both authorized under, and is bound by, Section 224(b) to establish “just and reasonable” pole rates.

² 47 U.S.C. § 224(a)(4): “The term ‘pole attachment’ means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

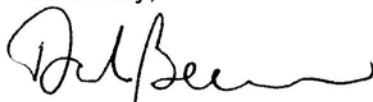
³ *Id.*, § 224(d)(1): ““For purposes of subsection (b) of this section, a rate is just and reasonable if....”

⁴ *NCTA v. Gulf Power Co.*, 534 U.S. 327 336-37 (2002).

In short, Section 224(b) is the touchstone of pole rate regulation.⁵ *Gulf Power* affirms the interconnectedness of Section 224(a)(4) to define "pole attachment" in Section 224(b). Similarly, here, implementation of Section 224(b)'s "just and reasonable" requirement perforce must look to Section 224(d)(1) -- whether the rate applies to attachments to solely to provide cable service, to provide telecom service, undefined services, or commingled services that involves one or more these services.

Finally, as we noted in our call, this analysis, and the FCC's rate proposal, does not eliminate the FCC's obligation to utilize Section 224(e) in formulating the telecom rate. Section 224(e) requires the FCC to follow certain apportionment rules. But it is agnostic on the rate that the formula produces: It does not mandate a rate higher, or lower, than the cable service rate. The statute provides the Commission with sufficient flexibility in crafting rate formulas for cable and telecom services that either rate could be higher than the other and both could be less than the upper bound that Congress established. Thus, even if, as the Commission proposes, its revised telecom service formula generates rates that are lower than the cable rate, this result is faithful to the structure and language of the statute. In allowing a pole owner to collect the upper bound of (d)(1), which is today's cable rate⁶ as the default rate, the Commission is providing pole owners with a "just and reasonable" rate as required by Section 224(b), as defined by Section 224(d)(1).

Sincerely,



Daniel Brenner

Counsel for Bright House Networks

cc:: Michael Steffen
Diane Holland
Raelynn Remy
Christi Shewman
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⁵ As Appeals Court Judge Carnes pointed out in his dissent, which was cited by Justice Kennedy in *Gulf Power*, "Because pole attachment is defined as "any attachment," and because of the unambiguous definition of "any," section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service." *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1281 (11th Cir. 2000) (dissenting opinion), *rev'd sub nom.* *NCTA v. Gulf Power Co.*

⁶ As noted in BHN's Comments, the FCC could have established the cable service rate below the upper bound but above the lower bound in 1986. That would have allowed a telecom service rate, if set at the upper bound, to have exceeded the cable rate.